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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 693

NORMAN BAKER, R. A. BELLOWS AND J. L. STATLER,
PETITIONERS AND APPELLANTS BELOW,

VS.

UNITED STATES OF AMERICA, RESPONDENT AND
APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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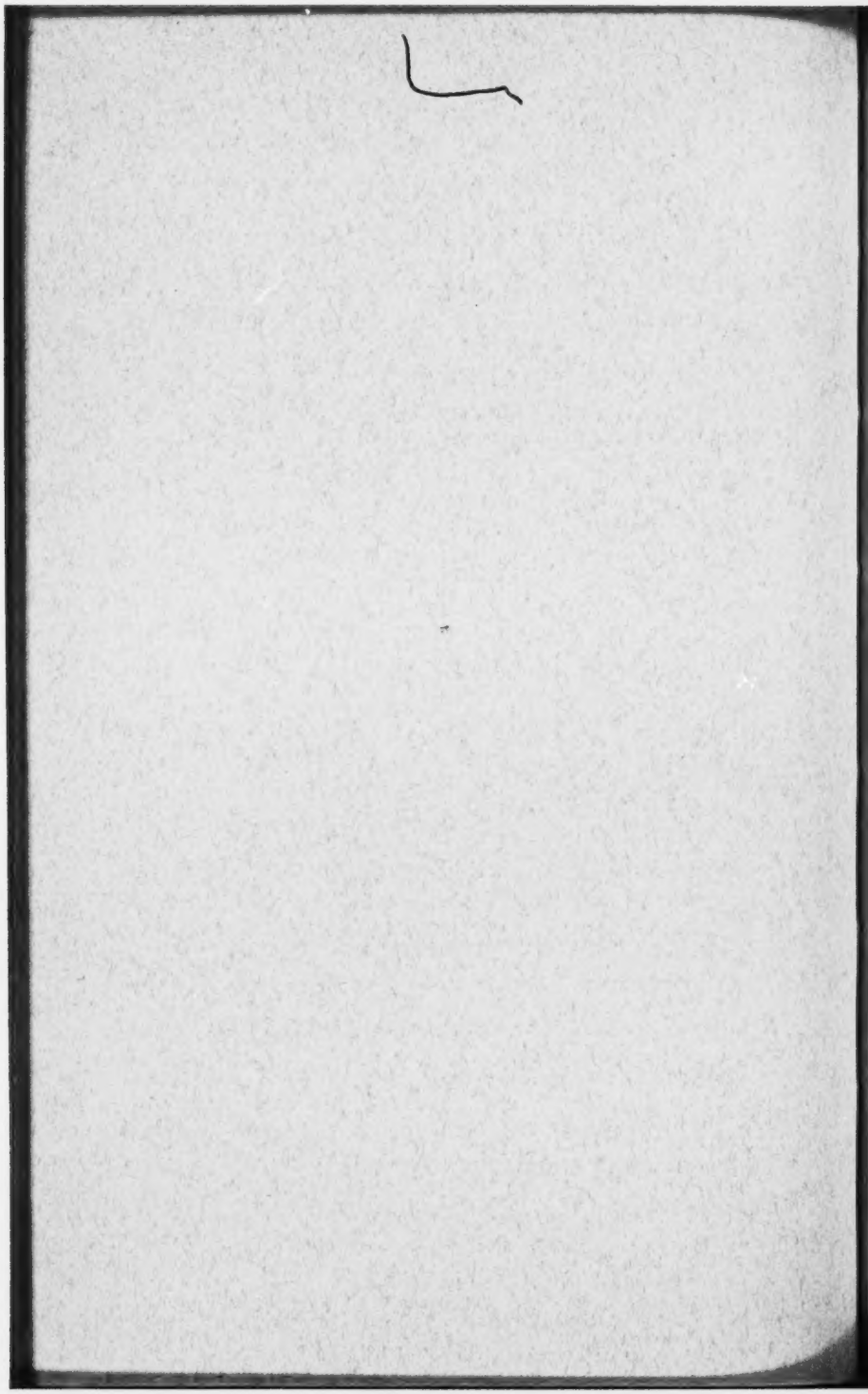

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To Honorable Charles Evans Hughes, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show:

SUMMARY STATEMENT OF MATTERS INVOLVED.

For alleged violation of Section 338 of Title 18, of the United States Code, Criminal Code 215, relating to using the mails to promote frauds, an indictment in seven counts was rendered against the petitioners (defendants), in the United States District Court at Little Rock, Arkansas, on the 20th day of September, 1939, charging that

defendants caused to be delivered by the United States mails certain letters and a package of salve for the purpose of effectuating an alleged scheme to defraud set out in Count 1, and incorporated by reference in each of the other counts (R. 1). Demurrers and motions for bill of particulars were overruled.

Upon trial to the jury a verdict of guilty on all seven counts was rendered on the 23rd day of January, 1940 (R. 1048), and on the 25th day of January, 1940, sentence of four years imprisonment and $4,000 fine was imposed upon Norman Baker, two years imprisonment on R. A. Bellows, and one year and one day on J. L. Statler (R. 1048), from which sentence petitioners appealed to the United States Circuit Court of Appeals, Eighth Circuit, on January 25, 1940 (R. 1048). On November 20, 1940, an opinion was filed and judgment entered affirming the judgment of the lower court (~~553F.~~ 115 2d 553) (~~not yet printed in Fed.~~ Rep.). On December 4, 1940, petition for rehearing was filed and considered and was denied by the Circuit Court of Appeals without opinion on the 7th day of December, 1940.

The opinion of the Circuit Court of Appeals, affirming the judgment, not yet officially published, is set out at pages 1189-1207 of the record.

That opinion sets a new precedent in the condonation of misconduct on the part of government attorneys.

Speaking of one of the many instances of such misconduct, and by no means the most prejudicial shown by the record, that Court said:

> *"This outrageous conduct on the part of the Government attorney was unethical, highly reprehensible, and merits unqualified condemnation"* (R. 1204).

Other matters of general importance that bring this case within the scope of the rules governing applications for certiorari to this Court are hereinafter stated.

ISSUES AND MATERIAL FACTS.

The printed record, exclusive of appellate proceedings, consists of 1,184 printed pages. The indictment, occupying forty pages of the record (R. 1-40), alleges sixteen (16) specific representations which it charges were made by petitioners "well knowing" that they were false (R. 1-5).

The indictment did not charge that any of the alleged misrepresentations were made "negligently" or without "proper investigation," but the trial court authorized the jury to infer an attempt to defraud if it found that petitioners made representations "negligently" or without "proper investigation" (R. 897-99). Exception was duly made to the instruction on this point (R. 910).

No evidence was offered to support several of the representations alleged in the indictment to be false, but the trial judge denied the request of petitioners that these representations be withdrawn from the consideration of the jury (R. 757, 764, 765).

The proof was largely directed to two of the alleged false representations, one of these being the alleged representation that the Baker remedies constituted a "sure cure" for cancer and the other that cancer was not curable by surgery, X-rays and radium.

A motion for a directed verdict was made at the close of the Government's evidence and at the conclusion of all of the evidence (R. 752).

The unusual number of oversights on the part of the Circuit Court of Appeals whereby it inadvertently overlooked objections that were made and the exceptions that were taken to rulings of the court (petition for rehearing, R. 1210-14) and the action of that court in grounding upon a gross misstatement of the evidence by one of the government attorneys, and not upon evidence, its conclusion on a material issue of fact, makes imperative a brief recital of the facts that are relevant in the consideration of the questions of law raised by their petition.

That recital will be restricted to facts which are either undisputed or not fairly disputable in the record.

Petitioners' promotion of a cancer remedy had its origin in an investigation made at the instance of petitioner Baker in the summer of 1929 (R. 81, 82,).

At that time Baker had no connection with any hospital, but was engaged in the conduct of various business enterprises in Muscatine, Iowa, including the ownership and operation of a radio station and the publication of a monthly magazine.

Reported results of a cancer treatment, used by a Doctor Ozias at Kansas City, led to an investigation of claims of the cure of cancer and other diseases by use of the treatment. The investigation then made confirmed the claims of cures that had been made by Doctor Ozias.

The remedy thus investigated was perfected by Baker, with the assistance of physicians (R. 637), and used at later established Baker hospitals at Muscatine, Iowa, and Eureka Springs, Arkansas. This prosecution arose from the use of the mails in the promotions of that remedy.

The remedy, sponsored by Baker after an investigation of its merits, was based on the conception that cancer is a systemic disease that cannot be cured solely by local treatment (R. 196).

In advertising the remedy, it was repeatedly stated that all cancer cases were *not* curable (R. 120, 129, 639), and during a three-year period 2,401 patients, seeking admission to the Baker Hospital at Eureka Springs, were turned away because, in the opinion of the hospital authorities, their cases were too far advanced for medical aid to be availing (R. 619).

There was no evidence that any person was, or claimed to have been, deceived or defrauded by petitioners. The only complaints, shown by the evidence, came from outside doctors.

Literature distributed by the Baker Hospitals covered a period of approximately ten years.

Parts of this literature, and also certain articles published in Baker's magazine in 1929 and 1930 were introduced as exhibits by the Government to its testimony.

These exhibits set forth:

Hundreds of testimonials of persons cured or claiming to have been cured by both the Ozias and the Baker treatments, case histories and reports of prior medical diagnoses of such persons, their names and addresses and those of their physicians, and photographs, showing the results of the treatments (R. 99-160); statements of eminent medical authorities, including an article by Doctor Mulvey, health commissioner of Milwaukee, Wisconsin, in the Milwaukee Leader of date February 10, 1930, condemning surgery, X-rays and radium as methods of treating cancer (R. 150); an account of a demonstration of the method and results of the Baker treatment on May 30, 1930, before a crowd of 50,000 people at Muscatine, the public statements there made by thirty persons that they had been cured of cancer by the treatment (R. 154), and addresses to the crowd by Baker and the then governor of Iowa (R. 153); repeated requests that public health officials, including the surgeon general of the United States, investigate the merits of the treatment (R. 149, 150).

The Government offered no evidence to show that any of the foregoing specific recitals was untrue, but attempted to establish false representations in three ways:

(1) By impeaching statements made in regard to test patients that were treated, not at a Baker Hospital which had not then been organized, but by Doctor Ozias in 1929 (R. 182).

(2) By testimony of medical experts as to the curative value of surgery, X-rays and radium in the treatment of cancer.

(3) By the testimony of experts as to the efficiency of the Baker treatment.

THE TEST PATIENTS.

In the course of the original investigation of the Ozias treatment five persons (authentic cancer cases) who had been pronounced incurable by leading physicians and clinics, including that of Mayo Brothers, were selected for tests, and some of the expense of treating these patients was to be paid by petitioner Baker (R. 85).

Petitioner Bellows, one of the investigators of the Ozias treatment, was himself afflicted with cancer, and took the treatment at the same time as the five test patients. Bellows, some times referred to in the record as the "Sixth Test Patient," was the only so-called "test patient" that petitioner ever represented as having been cured by the treatment; and that Bellows had cancer and was so cured appears without dispute in the record (R. 107, 109, 170, 631, 643).

It is the contention of petitioners that the conclusion of the court of appeals, hereinafter stated, that false statements were made as to the results of the treatment of the *five test patients*, is destitute of any basis in the record other than a twisted and distorted statement of the evidence by one of the government attorneys in the opening argument.

The attorney said in part:

> "Now, that book, gentlemen, is put out, the life story of Norman Baker, 'Doctors, Dynamiters and Gun Men,' and sent through the mail in 1936—and you can get one of them through the United States mail today. Same book, same story, same five test patients, purporting to represent to the public *that those people were well* and on their way to recovery and cured of cancer, and cured (fol. 1324) *by the Baker treatment.* That is what he does with this book that you could get through the United States mails today. Now, that is the proof in this case. Talk about fraud! Fraud!" (R. 798.)

The Court of Appeals held:

> "In November, 1929, he (Baker) opened the Baker Hospital at Muscatine. The magazine, first issued in December, 1929, stated that the *five test patients had been cured* (italics ours). Reprints carrying the *same story* were sent out in January, February, March, April and July, 1930. These test patients in fact died of cancer on November 25, 1929, January 7, 1930, December 28, 1929, May 3, 1930, and February 25, 1930, respectively. Dr. Ozias did not give Baker his formula for treatment of cancer, but two persons in his employ went to work for Baker. In 1936, Baker published a book entitled, 'Doctors, Dynamiters and Gunmen,' in which he again made claim to having favorably treated these test patients, all of whom had in fact been dead from cancer several years" (R. 1197, 1198).

The record shows by undisputed evidence:

(1) *The December, 1929, article* referred to in the opinion of the circuit court of appeals *did not represent* that the *five test patients,* or any of them, *"had been cured"* by the Ozias treatment, and the *February,* 1930, *article showed the death of one of these patients* who had discontinued the treatment and the circumstances under which it had been discontinued (R. 115, 117). The December article, as it related to the test patients, reported the progress they had made under the treatment, stated that none of them had "completed" it, and that "all traces of the cancers have not yet been eradicated" (R. 92). As to test patient number 1 the article expressly recites that the treatment was only "about half complete" and that the "investigators do not regard her as cured" (R. 85). That part of the articles dealing specifically with the test patients appears at pages 85-91 of the record.

The December article, while expressly stating that the treatment of the five test patients had not been completed, did represent *that cures in other cases* had been

effected and promised to report the results of the investigation of such cases in the January issue of the magazine (R. 92, 93). This was done (R. 98).

Bellows, one of the investigators, whose report was the basis of the December article, testified that it correctly stated the progress that had been made, when his report was submitted in November (R. 638).

Dr. Ozias, who gave the treatments, was a witness for the Government, but was asked no questions as to either the earlier or the final results of his treating these patients (R. 183).

(2) The story of the test patients in the December, 1929, article, prepared and furnished to the printer and published in November preceding (R. 639), *was not carried in any of the later articles* which, with the exception of the February article, did not refer at all to the *results* of the treatment of the test patients (January article, Record 96-109; February article, Record 110-114; March article, Record 118-128; April article, Record 128, 136; June article, Record 146-151; July article, Record 151-166).

(3) In 1934, the hospital issued a statement in regard to the test patients. This statement, published in catalogues of the Baker Hospital, appears in the record, at pages 239-241. *Abandonment of the treatment by all five of the original test patients, the cure of none of them, the death of three* and *the probable death of the remaining two,* are the representations made in that article.

The book, published in 1936 under the title, "Doctors, Dynamiters and Gunmen," referred to in the foregoing quotations from the argument of government counsel and the opinion of the circuit court of appeals, makes substantially the same representations about the test patients as are set out in the 1934 statement (R. 170-180), and thus concludes its story of the treatment of the five and of Bellows:

"Out of the six test patients none received full treatment except Mr. Bellows and he was absolutely cured" (R. 181).

The book referred to is a biography of petitioner Baker. One Alvin Winston was its author. Bellows, superintendent of the hospital, had never read the entire book (R. 171, 631).

The December, January, February, March, April, June and July articles were bound together in a pamphlet, designated as the "Cancer Reprint," and this pamphlet was introduced as Government's Exhibit No. 6 (R. 79).

SURGERY, X-RAYS AND RADIUM AS METHODS OF TREATING CANCER.

In the literature, exhibited to the indictment, and introduced in evidence, representations were made that surgery, X-rays and radium would not permanently cure cancer.

The literature in which the representations appeared showed on its face that they were not made as of the personal knowledge of petitioners but were based on the opinions of distinguished medical authorities (R. 932, 644-49).

That petitioners had the information thus set out in the literature and relied upon it, appears without dispute in the record (R. 649).

The Government did not impeach, nor attempt to impeach, *by evidence* the truth or accuracy of statements attributed to eminent physicians, condemning such methods of treating cancer, as set out in the literature.

But the government attorney, concluding the argument, asserted that the quotations were false, that the books to which reference was made in the exhibits either did not exist or that the purported quotations therefrom were garbled by petitioners, and insisted that petitioners should have introduced the books and records that would establish the truth of the statements quoted by them in the literature (R. 870-872).

Objection was made to this argument on the ground that the burden rested upon the Government to show that the representations were false, and not on petitioners to disprove the allegations of the indictment (R. 887). The court did not pass upon the objections (R. 887).

Motion and requests to withdraw from the consideration of the jury the alleged false representations as to the curative value of these methods of treating cancer were overruled and exception taken to the action of the court (R. 757, 758).

THE BAKER CANCER TREATMENT.

The complete Baker treatment for cancer consisted of a prescribed diet, the use of internal medicine and tonics, local medication, colonic irrigations, powder, pastes, ointments, salves and ~~injections~~ injections (R. 165).

Two formulas, used for injection only, were analyzed by government chemists who identified the principal ingredient of one as hydrochloric acid with *traces of some nitrogen bearing material he was unable to identify* (R. 365), and those of the other as phenol, alcohol and glycerine.

Medical experts testified in substance that these two medicines would not effect a cure for cancer nor anything else (R. 398, 399, 402). Such a conclusion was not based on any experience of the experts in the use of the treatment, either in whole or in part, nor any observation or investigation of its results in any case but rested on their knowledge of medicines and diseases (R. 402).

Dr. Ozias, testifying for the Government, stated that he considered his treatment (similar to the Baker treatment) the only proper way to treat cancer (R. 182).

Physicians, witnesses for petitioners, that the court held were qualified to testify as experts, testified that the remedy was efficient in treating cancer (R. 552, 593).

Forty-five former patients of the Baker Hospital (others were offered but not allowed to testify) testified as

witnesses for defendants. These, although not allowed to state that they had been cured of cancer, described their conditions and the results of the treatments. Their testimony, corroborated by photographs, showed the removal of tumors as large as an orange, or larger, by the treatment (R. 449-530).

MISCONDUCT OF THE GOVERNMENT ATTORNEYS.

The persistency of the district attorney in the effort to secure the admission in evidence of a fraud order issued against the witness Perdue after three adverse rulings and a reprimand by the trial judge (R. 574), was denounced by the court of appeals in the language quoted in part in the first question presented by this petition.

After these three adverse rulings of the trial judge and the reprimand of the district attorney, by the trial judge, the assistant prosecutor who closed the argument again referred to the fraud order and stated its contents to the jury (R. 547, 873).

The misstatement of the evidence, relating to the test patients, by government counsel has been previously shown. Upon objection to this and other misstatements of the evidence, the court gave no instruction to disregard it, stating only that the jury would be governed by the evidence and the law as charged by the court (R. 805).

The substance of the assertions of Government counsel, concluding the argument, in regard to quoted statements of eminent medical authorities concerning surgery, X-rays and radium, and the rulings of the court on the objection to such argument, have been heretofore stated (*supra*, p. 9).

Many extraneous matters injected into the proceedings by leading and suggestive questions, such as the statement that Baker had a witness "fake a letter" (R. 351) and that a treatment "ate a hole in the bladder" of a woman patient at the Baker Hospital (R. 310, 317), the

concurring answers of the witness on these two matters being later excluded as incompetent or hearsay, and in sulting questions to witnesses, such as the inquiry as to whether they had ever had syphilis or other venereal diseases (R. 493-535), will not be further recited.

Statements of matters not in evidence, made by the government attorneys during the examination of witnesses included such assertions as these:

That a man at the Baker Hospital who was "not a doctor," did not "pretend to be a doctor," was allowed to do "a doctor's work" (R. 312); that petitioners had a "big balance" in their bank account (R. 360); that Dr. Beatty, chief of staff at the Baker Hospital, had "purchased a medical license" (R. 323) and had "made a false oath" in connection with the issuance of death certificates (R. 704); that Dr. Perdue, a witness for petitioners, had had "his license * * * revoked" and did not "have any license to practice medicine" (R. 536).

Appeals to passion and prejudice in the opening argument (R. 788-805) and in the closing argument (R. 865-887) include assertions that Baker *stole* his cancer remedy from Dr. Ozias (R. 799); that he used his money to convert the hospital at Eureka Springs into a *"cancer trap"* (R. 801); that petitioners bled patients at the hospital of their *"last dollar"* and then sent them home to die (R. 808); that petitioners had become *"rich"* (there was no evidence of such wealth) through defrauding victims of cancer and their families (R. 68); that a verdict of not guilty would be a license to petitioners to *"get out and make a million dollars out of suckers"* (R. 805), and the assertion that the jurors' *neighbors* "might be misled" by petitioners and induced to go to the Baker Hospital which would get "all their money" and ship them back home with their "final story" written in a "death certificate" * * * signed by O. L. Beatty, chief of staff (R. 803).

Expressions of personal opinions and statements calculated to coerce a verdict by the government attorneys include the following statements to the jury:

"*You know* that you would not let one them (physicians at the Baker Hospital) treat a cur dog" (R. 799).

"*I know that you know*, gentlemen of the jury, that he (chief of the hospital staff) could not stand a medical test before any reputable medical board in the United States" (R. 885).

"I wouldn't let one of them (physicians at the Baker Hospital) come into my horse lot to treat a sick pig. *Neither would you*" (R. 884).

"The *burden is on you* to say whether or not *you will put the stamp of approval* on the most vicious fraud that was ever practiced on humanity. Turn these defendants scott free to walk out of this court room and reap their large rewards from practices in that vicious form. Go out and suck in a million dollars out of suckers in the state. Now are you going to permit them to do it. *It is up to you*" (R. 804, 805).

"An insult to the decency and dignity of any community to let a thing like that go on" (R. 888).

"The court will tell you in his instructions that a verdict in this case means truth speaking. Let your verdict speak the truth. When your verdict speaks the truth in this case, gentlemen, it will be 'We, the jury, find the defendants guilty, as charged in the indictment.' Then, and only then, will your verdict in this case speak the truth. Then, and only then, will you have discharged your duty—the duty that you owe your Government. The duty that you owe the State of Arkansas, and the duty that you owe yourself" (R. 804-805).

Upon objection to the opening argument and particularly to the statement and the paragraph last quoted, the court did not instruct the jury to disregard it but stated that the government attorney was stressing his views of the case and that the jury should be governed by the law and the evidence (R. 805). Other facts will be set out in the supporting brief.

JURISDICTION OF THIS COURT.

This petition is filed pursuant to Section 240 of the Judicial Code, being Section 347 of Title 28 of the United States Code (8 Federal Code Annotated 75) to review the decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered on November 20, 1940, affirming the judgment of the District Court of the United States for the Eastern District of Arkansas, in which circuit court of appeals a petition for rehearing was filed and considered and denied without opinion on December 7, 1940. This petition draws in question the decision of the circuit court of appeals and the district court on matters within Sections (a) and (b) of Division 5 of Rule 38 of the Revised Rules of the United States Supreme Court effective February 27, 1939, as amended.

QUESTIONS PRESENTED.

Principal questions involved in said appeal decided adversely to defendants which materially affected the determination thereof, were in brief:

1. Whether petitioners' constitutional right of a fair trial was substantially violated by the persistent and pronounced misconduct of the public prosecutors, a single instance thereof, and by no means the most prejudicial shown by the record, being thus denounced by the court of appeals:

> *"This outrageous conduct on the part of the government attorney was unethical, highly reprehensible, and merits unqualified condemnation"* (Opinion R. 1204).

2(a) Is it error to exclude evidence of information furnished to the defendants in a mail fraud case in which their good faith is an issue where such evidence is not offered as independent testimony to establish the facts communicated but to show the information on which the defendants acted? Put more specifically where de-

fendants are charged with using the mails to effectuate a scheme to defraud by making false representations that they had a sure cure for cancer and other diseases and that many persons suffering from cancer and other diseases who had previously been pronounced incurable by other doctors, had been cured by defendants' remedies, are facts communicated to defendants by patients treated and cured at defendants' hospitals, admissible to show their case histories and their diagnoses by other doctors as cancer or other specific diseases named in the indictment, for the purpose of showing good faith on the part of the defendants, such evidence being expressly offered for the limited purpose of showing good faith and not offered generally?

2(b) Where the circuit court of appeals, by inadvertently overlooking facts shown by the record, holds that the evidence referred to in Question 2(a) above had not been offered for the limited purpose stated, is it error for the circuit court of appeals to fail to correct its oversight in that respect when pointed out by petition for rehearing?

3. Where there is a total want of evidence to support one or more of the alleged false representations in the indictment, and defendants request instructions withdrawing such unsupported representations from the jury, should such requested instructions be given?

4(a) Where an indictment charging that the defendants devised a scheme to make certain false representations, also specifically charges that, when defendants devised the scheme and made such representations, they *knew* that said representations were false, should the court instruct the jury to convict the defendants if they find that the defendants did *not know* that such representations were false, but made them (a) "negligently," or made them (b) "without proper investigation," or made them (c) "wilfully and recklessly"?

4(b) It is proper to instruct the jury that an intent to defraud may be inferred from "negligence" or failure to make a "proper investigation" or that such negligence or failure to make proper investigation should be considered in determining whether the defendants acted in good faith without giving the jury any guide or standard by which it could determine whether such investigation had been made?

5(a) In a criminal case depending upon circumstantial evidence where the evidence for the Government and the uncontradicted evidence for defendants is more consistent with innocence than with guilt, should the court allow the jury to convict or direct a verdict of acquittal?

5(b) In a mail fraud case, is the mere opinion of experts not based upon facts observed by them that a remedy is valueless sufficient to show that a contrary opinion held by defendants was not held in good faith?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. In affirming the judgment in a case where the conduct of the public prosecutor, which it denounced as "outrageous," "unethical," "highly reprehensible" and "inexcusable," was not confined to occasional transgressions or inconsequential infractions of rules of fairness but involved persistent, pronounced and repeated violations of the right of the accused to a fair and impartial trial on the law and the evidence alone, the circuit court of appeals reached a conclusion in conflict with the applicable decisions of this court in *Berger* v. *United States,* 294 U. S. 78; *New York Central R. R. Co.* v. *Johnson,* 279 U. S. 31, and the decisions of the Court of Appeals for the Sixth Circuit in *Pierce* v. *United States,* 85 F. 2d 945, and the Court of Appeals for the Third Circuit in *United States* v. *Sprengel,* 103 F. 2d 876.

New York Central R. R. Co. v. *Johnson* holds that the trial court on its own motion should interfere to

protect the right of a litigant to a verdict on the law and the evidence uninfluenced by the appeals of counsel to passion and prejudice; *Berger* v. *United States; Pierce* v. *United States,* and *United States* v. *Sprengel* hold that the cumulative effect of prejudicial extraneous matters deliberately injected into the proceedings by a public prosecutor should be considered by an appellate court.

1(a). While each case turns largely on its own facts, the circuit court of appeals in disregarding as harmless error the conduct of a public prosecutor it denounced as above stated, set a precedent which, if allowed to stand, will encourage lawlessness in the enforcement of the law by tempting overzealous or unscrupulous public prosecutors to violate established rules and speculate as to the consequences of their own wrongs. The doctrine of harmless error will become intolerable if applied to official misconduct of the character described in the opinion of the circuit court of appeals, and in the end tear down those barriers established by society for the protection of its citizens (*People* v. *Fielding,* 150 N. Y. 53, N. E. 497; *People* v. *Wells,* 100 Cal. 459, 34 Pac. 1078) and in setting a precedent so fraught with mischief in the administration of criminal justice the circuit court of appeals extended the harmless error rule beyond any limits theretofore recognized by this court and to an extent that justifies an exercise of its supervisory powers to protect in the "public interest" the "fairness, integrity or the public reputation of judicial proceedings" (*United States* v. *Atkinson,* 297 U. S. 157, 80 L. Ed. 555-557).

2(a) The decision of the circuit court of appeals that case histories and reports of prior diagnoses furnished hospital authorities by patients in connection with their entrance examinations were properly excluded as hearsay, violated the rule sustained by the great weight of authority that, where good faith is an issue, the information on which a party acted, whether true or false, is material and competent evidence, and not hearsay.

Cases so holding include: *Hair* v. *U. S.*, (7th Cir.) 240 Fed. 233; *Hibbard* v. *U. S.*, (7th Cir.) 172 Fed. 66; *Harrison* v. *U. S.*, 200 Fed. 660 (6th Cir.). The rule is also approved in II Wigmore on Evidence (3rd Ed.), Section 245, page 42, and in Jones on Evidence (2nd Ed.), Section 1222, page 2246. The exclusion of such evidence, when offered to show good faith, seems to be an infringement of the rule pronounced by this court in *Durland* v. *United States*, 161 U. S. 306, 40 L. Ed. 709, which holds that good faith is a complete defense in a mail fraud case. So far as petitioners are advised, the question presented has not been determined by this court, but should be as it involves a rule of evidence of general importance.

2(b) In overlooking material matters, appearing without question in the record, and by reason of such oversight holding that the foregoing evidence was offered for a general rather than a limited purpose, and in refusing to correct these oversights when pointed out by petition for rehearing (R. 1212-1214) the circuit court of appeals deprived petitioners of the benefit of the rule pronounced in the foregoing authorities and by its own decision in *McLean Medicine Company* v. *United States*, 253 Fed. 674. The refusal of the court to correct these oversights, and pass upon the question actually presented by the assignments of error is in conflict with the principles pronounced by this court in *Maryland Casualty Company* v. *Jones*, 279 U. S. 702, 73 L. Ed. 960, holding that where on the face of the record the failure of the circuit court of appeals to consider an assignment of error is unexplained, the case should be reversed, and *Lonergan* v. *United States*, 303 U. S. 33, 82 L. Ed. 630, holding that "litigants may not be deprived of a hearing upon their points by wrongful construction of rules or their arbitrary application."

3. The refusal of requested instructions to withdraw from the jury issues entirely unsupported by the evidence, and the submission of such issues to the jury,

and the opinion of the circuit court of appeals upholding such submission, so far departed from the accepted and usual course of judicial procedure and so far sanctioned such departure by the lower court as to call for the exercise of this court's power of supervision, and was contrary to decisions of both the Supreme Court and various circuit courts of appeal, such as *Quercia* v. *U. S.*, 289 U. S. 466, 77 L. Ed. 1321; *U. S.* v. *Breitling*, 20 How. 252, 15 L. Ed. 900; *Patterson* v. *U. S.*, 222 Fed. 599; *Ward* v. *U. S.*, 14 Wall. 28, 20 L. Ed. 792; *Parks* v. *Ross*, 11 How. 362, 13 L. Ed. 730; *Nash* v. *U. S.*, 229 U. S. 373, and 14 R. C. L., pp 786 to 790, where over 200 citations are given in support of this rule. There is a direct conflict between these cases and *Shreve* v. *U. S.*, (C. C. A. 9th) 103 F. 2d 796, and *Kastell* v. *U. S.*, 23 F. 2d 156, upon which the prosecution relied.

4(a) As the indictment set up representations alleged to be false, and specifically charged that defendants *knew* those representations were false, the decision of the circuit court of appeals that defendants were not prejudiced by the charge of the court permitting the jury to convict upon finding that such representations were *not known* by the defendants to be false but were made by them *negligently*, or *without proper investigation*, is in conflict with the decisions of this court and with various decisions of the various circuit courts of appeal, including *Thornhill* v. *Alabama*, 310 U. S. 88, 84 L. Ed. 1093; *Thorwegan* v. *King*, 111 U. S. 549, 28 L. Ed. 514; *Nash* v. *U. S.*, 229 U. S. 373, 57 L. Ed. 1232; *Stromberg* v. *California*, 283 U. S. 359, 75 L. Ed. 1117; *Blackburn* v. *Crawford's Lessee*, 3 Wall. 175, 18 L. Ed. 186-194; *Snyder* v. *Rosenbaum*, 215 U. S. 261, 54 L. Ed. 186; *American R. R. Co.* v. *Didricksen*, 227 U. S. 145, 57 L. Ed. 456; *Patterson* v. *U. S.*, 222 Fed. 599; *Hathaway* v. *R. R.*, 29 Fed. 489; *U. S.* v. *Dillard*, 101 F. 2d 829; *McLean Med. Co.* v. *U. S.*, 253 Fed. 694, and so far departed from the accepted and usual course of judicial procedure in criminal cases and

so far sanctioned such a departure by the lower court as to call for the exercise of this court's supervision. 14 R. C. L. 782-784, Sec. 50; 3 Am. Jur. 630, Sec. 1103; *McDonough* v. *Williams*, 77 Ark. 261, 7 Ann. Cas. 276; *Gross* v. *State*, 186 Ind. 581, 117 U. S. 562, 1 A. L. R. 1151; *Gipe* v. *State*, 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419; *Hogan* v. *Service Co.*, ____ Mo. ____, 19 S. W. 2d 707, 65 A. L. R. 129; *Reno* v. *Bull*, 226 N. Y. 546, 124 N. E. 144; *Stardard M. I. Co.* v. *Beach L. & T. Co.*, 133 Fed. 636.

4(b) The trial court by its instruction to the jury to consider whether petitioners made a "sound and proper investigation such as one dealing with the lives of others in sober judgment should make" set up the character of the investigation and not the actual belief of the accused as the criterion by which guilt or innocence should be determined, authorized the jury to infer an intent to defraud from negligence or a failure to make a proper investigation, and also sent the jury on a voyage of speculation without chart or compass in that the instructions laid down no test nor guide by which the jury would determine whether such an investigation had been made. The decision of the circuit court of appeals, sanctioning such a charge, presents a conflict with the decision of the Court of Appeals for the Sixth Circuit, in *MacDonald* v. *U. S.*, 241 Fed. 693, 699, and of the Court of Appeals for the Third Circuit in *Kaufman* v. *U. S.*, 282 Fed. 776, holding that unless there is an intent to defraud, it matters not how unfounded, unreasonable or visionary the alleged scheme may be; and the decision of this court in *Delaware, etc.*, v. *Koske*, 279 U. S. 7, holding that standards of care may not be left to the uncertain and varying judgment of jurys.

5. The evidence for the Government upon which the court of appeals affirmed the judgment of the district court, and relied on by the Government to establish an intent to defraud, is so uncertain, indefinite, conjectural, circumstantial and negative that it can not, un-

der the federal rule, raise a question of fact upon that issue against the positive opposing testimony, establishing good faith in the making of representations concerning the efficiency of petitioners' cancer remedy; and, therefore, the district court should have directed a verdict in favor of petitioners, and, after the district court failed to do so, the court of appeals should have reversed the judgment of the district court. In failing so to do, that court disregarded the principles pronounced by this court in *Pennsylvania R. R. Co.* v. *Chamberlain*, 288 U. S. 377, 77 L. Ed. 819, which holds that inferences or conclusions that are in conflict with positive opposing testimony do not constitute substantial evidence to support a verdict, and with the applicable decision of this court in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 47 L. Ed. 90, which holds that a verdict may not be predicated solely upon the choice a jury might make between the conflicting opinions of medical experts, and the many applicable decisions of the circuit court of appeals which hold that peremptory instructions should be given in favor of the defendant where the verdict must be grounded on circumstances as consistent with innocence as with guilt, such cases including: *Maryland Cas. Co.* v. *Jones*, 279 U. S. 792, 73 L. Ed. 960; *U. S.* v. *Gulf Ref. Co.*, 268 U. S. 542, 69 L. Ed. 1082; *St. Paul F. & M. Ins. Co.* v. *Bachniann*, 285 U. S. 112, 76 L. Ed. 648.

6. In ruling on the motions to direct a verdict, both the lower court and the circuit court of appeals entirely failed to consider or give any effect to the large amount of absolutely undisputed evidence of credible, disinterested witnesses for the defendants tending to show good faith upon their part; that the Baker treatments in question included much more than the mere administration of injections of remedies Nos. 4 and 5, and that the Baker treatments, as administered at the hospitals in question, actually did produce many cures of cancer and other

ailments referred to in the indictment. The action of the court in ignoring said evidence was in conflict with various decisions of this court, including *U. S.* v. *Gulf Ref. Co.*, 268 U. S. 542, 69 L. Ed. 1082, and of the various circuit courts of appeal. See *Yusem* v. *U. S.*, 8 F. 2d 6 (C. C. A. 3), where conviction was reserved because the circuit court found that while there were some false statements, it appeared that they were not made with knowledge of their falsity, but merely "carelessly." The court said:

> "When all the facts are considered we are unable to reach any other conclusion than that the statement showed nothing more than a possible carelessness and not a scheme and artifice knowingly and wilfully devised with intent to defraud."

Also:

> "Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction."

citing *Hart* v. *U. S.*, 84 Fed. 799-808; *U. P. Coal Co.* v. *U. S.*, 173 Fed. 737-740; *Wright* v. *U. S.*, 227 Fed. 855-857; *Paddock* v. *U. S.*, 79 F. 2d 872. The decision so far departed from the accepted and usual course of judicial procedure and so far sanctioned such procedure by the lower court as to call for the exercise of this court's power of supervision.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court full and complete transcript of the record and the proceedings of the circuit court of appeals had in the case numbered and entitled on its docket No. 11683, Criminal, *Norman Baker, R. A. Bellows and J. L. Statler, Appellants,* v. *United States of America, Appellee,* to the end that this cause may be reviewed and determined by

this court as provided for by the statutes of the United States, and that the judgment herein of said circuit court of appeals be reversed by the court, and for such further relief as to this court may seem proper.

A. G. BUSH,
W. R. DONHAM,
FRED A. ISGRIG,
L. E. GWINN,
Attorneys for Petitioners.

Signed January 6, 1941,
A. G. BUSH,
Of Counsel.

Supreme Court of the United States

No. .....

NORMAN BAKER, R. A. BELLOWS AND J. L. STATLER, PETITIONERS AND APPELLANTS BELOW,

VS.

UNITED STATES OF AMERICA, RESPONDENT AND APPELLEE BELOW.

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI.

SPECIFICATION OF ERRORS.

1. The circuit court of appeals erred in refusing to reverse the case on account of the misconduct of the prosecuting attorneys described by the circuit court of appeals in its opinion as "outrageous" and "unethical," "highly reprehensible" and "meriting unqualified condemnation" (Op. 17), and other misconduct in argument, examination of witnesses and statements in the presence of the jury, set out in detail in the supporting argument.

2(a). The lower court erred in rejecting as hearsay evidence of various patients applying to the Baker Hospital for treatment, as to their case histories, including previous diagnoses by other physicians, such evidence having been definitely offered by the defendants for the limited purpose of showing knowledge on the part of the defendants and good faith, and not having been offered generally.

2(b). The circuit court of appeals, after being informed by the petition for rehearing that it had overlooked the specific offers of evidence mentioned in 2(a) above limiting said evidence to the purpose of showing good faith, erred in refusing to reopen that question and correct its erroneous ruling thereon.

3. The court erred in refusing defendants' requested instructions to withdraw from the jury alleged false representations Nos. 7 and 14, relating to prices being low (R. 764-765) and No. 9 relating to guarantee (R. 766), and in submitting to the jury representation No. 10 regarding pictures of cured patients, there being no evidence whatever that Representations 7 and 14 were false, or that the defendants ever made or devised any scheme to make representation No. 9 as to the alleged guarantee that patients not cured at their first stay at the hospital would be treated free thereafter, or No. 10 as to the so-called five test patients' being *completely* cured *by defendants.*

4. The lower court erred in submitting to the jury an issue not made by the pleadings, viz.: That even if the defendants did not know that the alleged representations were false, they should be found guilty if they made those representations (a) "negligently," (b) "without proper investigation to see whether they were true," or (c) "in reckless disregard of whether they were true or not." The circuit court of appeals erred in upholding the submission of those issues to the jury and in failing to differentiate between negligence and fraud as applied to criminal charges.

5. The court erred (a) in overruling defendants' motion for a directed verdict, and (b) in permitting the jury to convict defendants upon the Government's evidence which was as consistent with innocence as with guilt, and (c) in permitting the conviction upon the testimony as to mere opinion of expert witnesses not based upon facts observed by them.

SUMMARY OF THE ARGUMENT.

I. Misconduct of Government Counsel—As the argument, relating to such misconduct, is brief, instead of summarizing it, we here direct attention to certain points decided or overlooked by the circuit court of appeals that are relevant in the consideration of the issue presented to this court.

The circuit court of appeals held that petitioners were not prejudiced by misconduct of government counsel, which that court denounced as *"outrageous"* and *"reprehensible"* on the ground that the extraneous matters which the government attorney sought to inject into the proceedings under circumstances that led to his reprimand by the trial judge and his denunciation by the circuit court of appeals were later proven by competent evidence (R. 1205).

In reaching that conclusion, the trial court inadvertently overlooked the fact that the fraud order, which the trial court refused to admit in evidence despite the strenuous insistence of the government attorney, continued after three adverse rulings of the trial judge (R. 547), was never admitted in evidence at all, but was later injected into the proceedings by a statement of the issuance and contents thereof by the government attorney in the concluding argument (R. 873). When this was done in flagrant disregard of the previous rulings of the court, petitioners did not make further objection. Such was not required, but the *"situation was one which called for stern rebuke and repressive measures"* on the part of the trial court (*Berger* v. *U. S.*, 295 U. S. 97).

Obviously, the circuit court of appeals did not intend to hold that earlier misconduct of the character denounced by it was cured by later misconduct, relating to the same matter, or a worse character but its oversight on this and other material matters led that court

to disregard the *cumulative effect* of the many acts of misconduct on the part of the government attorneys shown by the record. This was clear error. *Berger* v. *U. S.*, 295 U. S. 78, 79 L. Ed. 1314; *Pierce* v. *U. S.*, 86 F. 2d 949 (6th C. C. A.); *U. S.* v. *Sprengel,* 103 F. 2d 876 (3rd C. C. A.).

A fraud order, being an administrative act and not final (*Degge* v. *Hitchcock,* 227 U. S. 162, 57 L. Ed. 135), is not admissible in evidence, and particularly in a jurisdiction that excludes, when offered to impeach a witness, prior acts of misconduct that do not result in convictions for felonies. *Middleton* v. *United States,* 49 F. 2d 538, 540 (C. C. A. 8). But regardless of its admissibility, repeated adverse rulings of the trial court should have ended the matter and the subsequent misconduct of the government attorney, amounting to contempt of court, should not be disregarded as harmless error.

Objections were made and exceptions taken in abundance. More would have been prejudicial to the accused. We have heretofore stated, or shall hereafter state, enough of these to show that issues presented by the appeal were duly raised, but objections and exceptions are not specially emphasized for the reason that the record establishes a denial of the constitutional right of petitioners to a fair trial.

It is the well-settled rule that where the record shows a substantial violation of the constitutional privilege of the accused in criminal cases, and of litigants in civil cases, to a jury verdict upon the evidence and the law, as expounded in a proper charge, uninfluenced by external considerations, it is the duty of a federal reviewing court to apply corrective processes, regardless of objection, exception, motion or assignment of error. *Brasfield* v. *U. S.*, 272 U. S. 448, 71 L. Ed. 345; *Berger* v. *U. S.*, 295 U. S. 78, 79 L. Ed. 1314; *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 73 L. Ed. 706; *Pierce* v. *U. S.*, 86 F. 2d 949 (C. C. A. 6).

II. Submitting Unsupported Issues—The indictment charged that the alleged scheme to defraud included sixteen means by which it was to be accomplished, consisting of sixteen representations which the indictment alleged were false and which the indictment charged that the defendants *knew* were false.

Alleged representation No. 2 in substance was that defendants had a sure cure for cancer.

Alleged representation No. 6 was that persons given up to die by the regular medical profession had been cured by the defendants.

Vital questions are whether *defendants believed* that the Baker treatments would cure cancer, and that persons cured of cancer at the Baker Hospital *had been previously given up* by other physicians.

To prove they did believe these things, defendants called many witnesses who testified they had been cured of various ailments at the Baker Hospitals. To prove that defendants believed these persons had really been afflicted with cancer and had previously been given up by other physicians, they asked these witnesses to state what they gave the hospital as the histories of their cases and as diagnoses made of their cases by other physicians previous to going to the Baker Hospitals.

All of this evidence was specifically offered for the limited purpose of showing knowledge and good faith on the part of the defendants and not as substantive evidence of the diseases from which the patients were suffering.

The court sustained objections to this testimony. The circuit court of appeals upheld this action of the lower court on the ground that such evidence would have been hearsay. Its opinion implied that it would have been admissible if offered for the limited purpose of showing knowledge and good faith on the part of the defendants. The record shows that the testimony was so offered. Those offers were quoted at length in the petition for rehearing (R. 1212-1214), but the circuit court

of appeals refused to correct its oversight and denied a rehearing without opinion.

This ruling of the circuit court of appeals is in direct conflict with many decisions of our Supreme Court and the other circuit courts, including *McLean Med. Co.* v. *U. S.*, 253 Fed. 694; *Hibbard* v. *U. S.*, (C. C. A. 7th) 172 Fed. 66, 18 Ann. Cas. 1040; *Maryland Cas. Co.* v. *Jones*, 279 U. S. 792, 73 L. Ed. 690; *Shepard* v. *U. S.*, 290 U. S. 96, 78 L. Ed. 196; *U. S.* v. *Gulf Ref. Co.*, 268 U. S. 542, 69 L. Ed. 1082, and the general principles of evidence as stated in 2 Wigmore on Evidence (3rd Ed.), page 42, Section 245.

II(b). The failure of the circuit court of appeals to correct its oversight when pointed out by petition for rehearing, is in conflict with *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 73 L. Ed. 960-963.

III. Unsupported Issues—The lower court erred in submitting issues wholly unsupported by the evidence. The sixteen alleged misrepresentations set up as means to accomplish the alleged scheme to defraud included representations Nos. 7 and 14 that charges at the Baker Hospital were low, No. 9 that if cure was not perfected at the patient's first stay, subsequent treatments would be furnished free, and No. 10 that defendants published pictures of certain patients representing them as having been completely cured by the defendants.

No evidence was introduced that the charges of the Baker Hospital were not low. As a matter of common knowledge it is obvious that they were low when it is considered that the weekly charge covered not only room, board and nursing, but also colonic irrigations, medicines, and the services of the attending physicians.

There was no evidence that defendants ever represented they would treat free patients who were not cured at their *first stay* at the hospital. The nearest approach to it was defendants' printed guarantee that if the patients, who had been *discharged* by the hospital *as cured*, suffered a *recurrence of certain ailments at the same location*, they would be treated free (R. 28 and 265).

There was no evidence that the guarantee actually given by defendants had not been scrupulously lived up to by them.

The prosecution laid great emphasis upon representation No. 10, claiming that five so-called test patients had been represented as being completely cured by defendants. The nearest approach to such evidence is the statement in the record:

> "Mr. Baker and his fellow investigators have seen with their own eyes enormous and malignant cancers in advanced states of growth rapidly yield to a new and painless treatment, soften and disappear. * * * They have watched these cases of cancer under treatment and have seen the cancers grow smaller and pass away" (R. 81).

but that is accompanied by specific statements that they were not regarded as cured. These statements are quoted at length in the supporting argument and need not be repeated in this summary.

It should be noted that these test patients were treated by Dr. Ozias and *not by the defendants*; also, that the statements regarding their improvement were the statements given by Dr. Ozias to Mr. Bellows and reported by Mr. Bellows to Mr. Baker, and that they were printed as given by Dr. Ozias.

There was no evidence to justify submitting to the jury representations Nos. 7, 9 and 10.

All sixteen of the representations were quoted by the court in its instructions to the jury and the jury permitted to find defendants guilty upon any of them.

The circuit court of appeals, following *Shreve* v. *U. S.*, (C. C. A. 9) 103 F. 2d 796, held that it was not error to submit all sixteen of these representations to the jury, even though some of them were *entirely unproven* and that the court was under *no duty to withdraw* any which were not proved. That holding is directly contrary to the overwhelming weight of authority.

IV. "Negligence" Is Not "Fraud"—The court instructed the jury that even if the jury found defendants did not know the alleged representations were false, it could properly convict defendants upon finding that those representations were made by defendants (a) "negligently," (b) "without proper investigation," or (c) "wilfully or recklessly without caring whether they were true or not."

It is well settled that mere negligence is not fraud.

The charge of the court that defendants would be liable if they made the representations in question "without proper investigation," turned the jury loose upon an unknown sea without chart or compass. What would be a "proper investigation"?

In criminal cases, if the Government is to rely upon representations negligently made or made without proper investigation, it certainly ought to say so in its indictment. Otherwise, defendants will be given no notice of the charge against which they are to defend and, if convicted, it would be without due process of law.

V. Mere Opinion Not Sufficient—The opinion of two eminent physicians called as expert witnesses by the Government, that two of defendants' medicines would not cure cancer or anything else (except skin cancers), was an opinion merely. It was not based upon any experience to support it. Neither of these witnesses had ever applied the medicine in question to human beings. One had applied one of the medicines to a mouse, but did not pretend that the effect upon a mouse, weighing perhaps two ounces, would be the same as upon a human being weighing one hundred and fifty pounds, more or less. They were opinions only, as shown by the terms in which they were expressed—"I think," etc.

It is true that the circuit court of appeals cited various circumstances in its opinion, as supporting the verdict, but an examination of those circumstances shows that they were all just as consistent with innocence, if carefully considered, as they were with guilt.

ARGUMENT.

I.

MISCONDUCT OF GOVERNMENT COUNSEL.

If there is any canon of professional ethics or rule of fairness, governing the conduct of criminal prosecutions, that was not violated by the government attorneys during the trial, it has not been called to our attention.

Instances of misconduct are spread throughout the record and a bare recital thereof would extend this argument to unreasonable lengths.

We are not particularly concerned with the intensity of vituperative epithets so often hurled against petitioners by the public prosecutors nor with the obvious attempts of the latter to establish a reputation for ferocious eloquence (R. 865, 867, 872, 885, 886, 801, 803, 804).

But we are concerned with the abuse of witnesses, misstatements of testimony, appeals to passion and prejudice, expressions of personal opinion, and statements of material matters not in evidence.

(1)

Abuse of Witnesses.

Government counsel were not content to speak with bitter invective against petitioners, but they frequently asked questions that could have had no other purpose than to degrade or humiliate witnesses for the petitioners. Among these were the questions asked several of petitioners' witnesses if they had not had syphilis or some other venereal disease (R. 493, 535).

The government attorneys had strenuously objected, and the court sustained their objections, to allowing any witness for petitioners to testify as to the disease for which he had been treated and cured at the Baker Hospi-

tal. But the Government, when it suited its purpose to disregard the standard it had demanded for the testimony of laymen, was permitted to ask these degrading and humiliating questions which had no bearing on any issue presented by the record.

(2)

Misstatements of Testimony.

The mass of literature was such as to make misstatements of the evidence peculiarly prejudicial and the record is replete with distorted and twisted statements of the evidence by the government attorneys.

The flagrant misstatement of representations in the book "Doctors, Dynamiters and Gunmen," concerning the five test patients with the prejudicial consequences thereof in the circuit court of appeals, was stated with sufficient elaboration in the petition.

A guaranty certificate, appearing at page 28 of the record, and elsewhere, represented that certain diseases, therein enumerated and under the conditions therein stated, would be treated without additional cost if there was a recurrence thereof *after the hospital had "discharged patient as cured."*

This certificate was plain and unambiguous in its terms but an effort was made to twist it into a guaranty either to cure the patient or if he was not cured during his first stay at the hospital, thereafter to give treatments free (R. 265).

Another serious misstatement of the evidence was made in the concluding argument, it being asserted that petitioners had quoted from statements attributed to eminent physicians, concerning the use of surgery X-rays and radium as methods of treating cancer, without giving the "slightest indication" where such statements could be found (R. 870-872). In many instances, however, these statements were accompanied by specific references, showing where they could be found (R. 150, 248, 251, 255).

(3)

Appeals to Passion and Prejudice.

In the petition we have recited many examples of appeals to passion and prejudice, both in the examination of witnesses and in the argument, such as the assertions that petitioners were "rich," that they had a "big bank balance," that they were deliberately luring persons afflicted with cancer to a "cancer trap" for the purpose of getting their money and letting them die, and these need not be elaborated. To recite all of the instances where such appeals were made would be to quote a large part of both the opening and the closing arguments (R. 799, 800, 803, 804, 805, 867, 874, 884, 885, 886).

(4)

Expressions of Personal Opinion.

Several of these expressions have been set out in the petition and in the aggregate constitute violations of established canons of professional ethics on an almost unprecedented scale. In fact, the government attorneys in the expression of their opinion, such as the assertion that they knew that the jurors would not allow any physician at the Baker Hospital to treat a "sick pig" or a "cur dog," and others of like tenor, which not only put forth the opinion of the government attorneys but implied such qualities as mind readers as to be able to state what the jurors knew (R. 884, 799) went to the point of attempted coercion when they asserted in substance that an acquittal would be "an insult to the decency and dignity of any community" (R. 886) and more specifically that the verdict would not "speak the truth" unless it was a verdict of guilty as charged in the indictment (R. 805). Upon objection to this last-mentioned argument, the court instead of directing the jury to disregard it, stated that the government attorney had "stressed what he thinks are the facts, his views as to the case"

and that the jury would be governed by the evidence (R. 805).

Asserting that jurors, acting under the sanction of an oath, would render a false verdict if they discharged the defendants and prove recreant to the obligation they owed their state and their Government, goes far beyond the limits of fair comment, and the prejudice was not corrected by the mild judicial action taken by the court.

The language of Mr. Justice Roberts of this court in the dissenting opinion in *Socony-Vacuum Oil Co.* v. *U. S.*, 310 U. S. 150, 84 L. Ed. 1129, regardless of its application there, applies with peculiar force to the statement of the government attorney here under consideration and we quote therefrom as follows:

> *"One of the most reprehensible things a prosecutor can do is to attempt to put into evidence before the jury his own, and his colleagues', opinion as to the guilt of the defendants he is prosecuting. Such a practice brings before the jury the unsworn testimony of a sworn officer of the Government. This fact lends it undue and improper weight and injects an element into the case which is so insidious and so impossible to counteract that trial judges, in my experiences, have never hesitated to withdraw a juror and declare a mistrial because of this violation of the canons."*

(5)

Statements of Matters Not in Evidence.

The record is cluttered with testimonial assertions and statements by counsel for the Government of facts not proven in evidence. Many instances thereof, but by no means all that appear in the record, are set forth in the petition.

The consistency and the persistency with which extraneous prejudicial matters were injected into the proceedings by the government attorneys compel a conclusion that this was done deliberately and not as a result

of inadvertence or misunderstanding. It would be an impeachment of their legal learning to suggest that they, the government attorneys, did not know better than to make some of the statements of matters not in evidence that appear in the record. We shall not recite these but refer the court to pages of the record which show that the government attorneys often traveled outside the record, and far beyond the record, in their efforts to secure a conviction (R. 305, 306, 312, 360, 323, 704, 588, 536, 537, 799, 886, 870-873).

Included in these matters was the unfounded suggestion that photographs introduced in evidence, showing the condition of patients before and after they had taken treatment at the Baker Hospital, had been *"dressed up"* (R. 886), and the statement in the concluding argument, in substance, that purported statements or quotations from distinguished physicians, concerning the use of surgery, X-rays and radium in the treatment of cancer, had either been garbled or fabricated (R. 870-873).

It appeared without dispute in the evidence that petitioners had the information, concerning the views of these authorities, as set out in their literature, and that they relied on such information (R. 649).

In that situation and particularly in view of the importance of the evidence which the government attorney sought to impeach by his unsworn testimony, his conduct was something more than prejudicial error. It was incurable error.

To illustrate the extent to which that part of the argument under consideration (R. 870-873) violated established rules, we quote therefrom as follows:

> "They (petitioners) say it (a statement of Dr. Bloodgood) is the Johns Hopkins medical record—where? What record? What page of what record? If you had the record, why didn't you bring it? You tried to quote from a record you didn't have, and tried to palm it off on the public. *That quotation is not true.*

Objection to this argument on the ground that the burden was on the Government to prove that representations made by defendants were false, and not on the defendants to disprove the allegations of the indictment, was disregarded by the trial court (R. 887).

As bearing on the foregoing and other statements of matters, not shown by the evidence, we shall state the principles that should be applied in the language of two courts, one a federal and the other a state appellate court.

In *McKibben* v. *Philadelphia R. R. Co.*, 251 Fed. 577 (C. C. A. 3), the court said:

> "The possibility of the verdicts of juries being based on that which is not evidence goes to the very foundation of that fair and impartial trial for which courts exist."

In *Pullman Co.* v. *Pennock,* 118 Tenn. 565, the court said:

> "No verdict should be allowed to stand where counsel deliberately and persistently inject into the record matter calculated to prejudice the jury against the opposite party and influence the jurors in their deliberation. *Tampering with jurors in or out of court in any form can not be tolerated*" (italics ours).

The circuit court of appeals in referring to some of the misconduct brought to the attention of that court in the assignment of errors, stated that motion for a mistrial was not made. *Such a requirement should not be imposed where the cumulative effect of a series of acts is involved, nor ever when the fairness or public reputation of a federal trial is involved.*

The contention that motion for a mistrial should have been made was presented to the Court of Appeals for the Sixth Circuit in *Pierce* v. *U. S.*, 86 F. 2d 949, 952, 954, and the answer of the court is pertinent to the questions presented by the record here. We quote therefrom as follows:

"Indulgence was designed rather than inadvertent, and an improper purpose its only explanation. *That it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so.* * * * Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums where neither bias nor prejudice rules, and appeals to passion find no place, though the Government itself be there a litigant. * * * 'Public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.' *N. Y. Central R. Co.* v. *Johnson, supra,* 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706. Where such paramount considerations are involved, procedural niceties will not preclude a court from correcting error" (italics supplied).

II.

REJECTING EVIDENCE OFFERED TO SHOW GOOD FAITH.

(a) Where defendants are charged with using the mails to effectuate a scheme to defraud by making false representations that they had a sure cure for cancer and other diseases and that many persons suffering from cancer and other diseases who had previously been pronounced incurable by other doctors, had been cured by defendants' remedies, *are facts communicated to defendants by patients when examined for admission at defendants' hospitals, admissible to show their case histories* and their diagnoses by other doctors as cancer or other specific diseases named in the indictment, for the purpose of showing their good faith, such evidence being expressly offered for that limited purpose.

The indictment charged that defendants formed a scheme to obtain money by false representations and

that the scheme was to make sixteen certain representations which for convenience we refer to as numbers 1 to 16 (R. 1-4).

It alleged *seriatim* that all these representations were false. It alleged specifically that defendants *knew* they were each and all false.

Representations Nos. 2, 3, 6, 12 and 15 in full as follows:

> 2. "That Norman Baker, one of the defendants herein, had, during the year 1929, discovered and perfected a sure cure for cancer, hereinafter referred to as the Baker cancer cure."
>
> 3. "That thousands of people suffering from cancer had been cured by the remedy which the defendant pretended had been discovered by the said Norman Baker."
>
> 6. "That many persons who had been given up to die by members of the regular medical profession had been healed of cancer by the administration of the said pretended Baker cancer cure in said Baker Hospital and Baker Institute."
>
> 12. "That thousands of persons suffering from the above-mentioned diseases had been cured and were being cured by the said defendants at the said Baker Hospital and Baker Institute by the said defendants."
>
> 15. "That many persons suffering from heart disease, Bright's disease, tumors and goiters had been healed by the defendants at the said Baker Hospital and Baker Institute after said sufferers had been informed by their regular practicing physicians that their malady was incurable."
>
> (R. 3, 4 and 5.)

It charged and it was incumbent upon the Government to prove that the defendants actually knew that these representations were false and intended to make them for the purpose of committing fraud. It sought to do this by circumstantial evidence. Therefore, defend-

ants had the right to prove absence of fraudulent intent; to show that they believed the statements were true; and to show they believed that they had a cure for cancer and for the other diseases mentioned in the indictment. They had the right to prove that they believed patients cured at their hospitals had cancer and other diseases mentioned in the indictment. They had the right to prove that they believed that such patients had been previously given up to die by other doctors as stated in representation No. 6, or that their maladies had been diagnosed as incurable as stated in representation No. 15.

For this purpose, defendants offered the testimony of Emily Erstine that prior to going to the Baker Hospital her doctors told her she had cancer (R. 483-486); the testimony of Lloyd Buchert as to a written diagnosis of cancer given him by other doctors before going to the Baker Hospital (R. 503 and 1120) (Assignment of Error No. 105). They offered a letter to W. J. Bishop from the Willis Campbell Clinic of Memphis, Tennessee, showing his ailment (R. 460 and 1141-1144). They offered the testimony of T. N. Hemphill (R. 451 and 453) to show that Dr. Brindley had diagnosed his case as cancer in 1924 (R. 451 to 455). They offered to show all these things were communicated to defendants.

Such testimony was admissible, first, to show that *defendants were informed* that those persons had been diagnosed as having cancer; second, to show that they had been treated for cancer and other diseases by other doctors who failed to cure them; third, to show defendants in good faith believed that Representations 2, 6 and 15 were true. Such testimony would also have been admissible to show the investigation they made and the care they exercised, and that they did not make their representations recklessly, if that had been in issue.

The circuit court of appeals disposed of defendants' assignments upon this matter by saying (page 7):

> "Certain patients who came to the Baker Hospital for treatment were not permitted to testify that other doctors had told them they had cancer, and letters alleged to show that fact were also rejected. The evidence was offered *generally* and not for any limited purpose. The offer of proof contained no suggestion that the witness *had communicated* the alleged conversation to the defendants or hospital authorities. The evidence was clearly hearsay and would seem to have no bearing upon any issue and was properly rejected."

This statement implies that the testimony would have been admissible to show good faith if offered for the purpose of showing that it had been communicated to the defendants. The statement of the court that it was not so offered is conclusively shown by the record to be erroneous.

The record shows that witness, Lloyd Buchert, testified expressly that when he went to the Baker Hospital *he delivered the written diagnosis* which he had received from Dr. Vadheim, *to the hospital authorities* (see R. 503 for Mr. Buchert's testimony. Also Assignment of Error No. 105, R. 1120).

The testimony of W. J. Bishop (R. 460) referred to a letter bearing upon the nature of his ailment sent to him by Dr. J. S. Speed of the Willis Campbell Clinic, and in offering the letter Judge Donham said:

> "We are offering the document in evidence, Your Honor, not as proof of the actual facts stated in it, but as being such a document as would *induce belief* on the part of the defendants that he was suffering from the disease diagnosed at the Willis Campbell Hospital."
>
> See Assignment of Error No. 118 (R. 1141).

See, also, the testimony of T. N. Hemphill (R. 451) where Mr. Isgrig said:

"I want to ask him what he told them the other doctors had said. Of course, it is not to prove what his condition was, but to prove their good faith in claiming they could cure cancer.

Mr. Catlett: I object.

The Court: Objection sustained.

Mr. Isgrig: Save our exceptions."

Also, page 453, offer by Mr. Bush:

"The defendants offer to show by this witness that at the time he went to the Baker Hospital he gave them a history of his case which included the following matters."

Also, on page 454:

"We are not offering it as original evidence but we are offering it for the purpose of showing what information was given to them and that they acted in good faith in accepting it."

Exceptions were then saved.

The part offered and copied included the following:

"In 1924 I went to Dr. Brindley and he diagnosed the case as cancer of the lower lip" (R. 455).

and other matters.

The same point was presented by Judge Donham, record page 456:

"Your Honor, may we take up a matter with the court about the admissibility of this interrogation. Anything in the world that would induce belief on their part is competent to establish their belief, but not competent to establish the fact that he did have it. In other words, it is not a matter of hearsay; anything that would induce a man ordinarily to believe that a person was suffering from cancer is competent on their good faith—not to establish the fact, but as establishing good faith on their part, and honest belief. You see, the question here is their honest belief."

Thus it is clearly evident that this court was in error in saying the testimony in question was not offered for the limited purpose for which it was admissible.

That such evidence was admissible is clearly shown in *McLean Med. Co.* v. *U. S.*, 253 Fed. 694, where it was held error to refuse to admit in evidence testimonial letters offered for the purpose of showing honest belief on the part of the defendants.

The ruling of the circuit court of appeals therefore is directly in conflict with *McLean Med. Co.* v. *U. S.*, 253 Fed. 694, where it was held error to refuse to admit in evidence testimonial letters offered for the purpose of showing honest belief on the part of the defendants in the curative property of their medicines. It conflicts with *Hibbard* v. *U. S.*, (C. C. A. 7th) 172 Fed. 66, 18 Ann. Cas. 1040; *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 73 L. Ed. 960; *Shepard* v. *U. S.*, 290 U. S. 96, 78 L. Ed. 196; *U. S.* v. *Gulf Ref. Co.*, 268 U. S. 542, 69 L. Ed. 1082.

It is in conflict with the general principles of evidence as stated in 2 Wigmore on Evidence (3rd Ed.), Paragraph 245 (page 42).

It is upon this principle that one accused of murder may show the communication to him of threats made by the deceased to justify a belief in the necessity of self-defense.

On the same principle, communications made to the defendants in this case were admissible to show that they believed in the representations regarding their cured patients having been previously given up to die by other doctors and that they believed such patients had cancer.

The good faith of petitioners was a material issue and it is well settled that where the good faith of a party is involved the "*information on which he acted, whether true or false, is original and material evidence, and not hearsay.*" Jones on Evidence (2d Ed.), Section 1022, page 2246; Wigmore (3rd Ed.), Volume 6, Section 1789, page 2311; *Harrison* v. *U. S.*, 100 Fed. 660 (C. C. A. 6);

Hair v. *U. S.*, 240 Fed. 233 (C. C. A. 7); *Hibbard* v. *U. S.*, 172 Fed. 66 (C. C. A. 7).

In *Hair* v. *U. S.*, *supra*, a mail fraud case, the court said:

> "Of the essence of any such alleged scheme or artifice is the intent to defraud. If this be wanting, there is no such scheme or artifice and no crime. Letters of the nature of those excluded, coming to the attention of the defendants before the time of the alleged offenses, and reasonably capable of inducing or confirming or strengthening faith in the excellence and efficiency of the product, are admissible under such charge, on the question whether the representation charged and proved were made in good faith or with intent to defraud."

II(b). Where the circuit court of appeals, by inadvertently overlooking facts shown by the record, holds that the evidence referred to in Question II(a) above had not been offered for the limited purpose stated, is it error for the circuit court of appeals to fail to correct its oversight in that respect when pointed out by petition for rehearing?

Upon the petition for rehearing defendants expressly pointed out this oversight of the court of appeals and quoted defendants' offers of evidence from the record as set out above (see Petition for Rehearing pp. 19 to 21).

Nevertheless, the court failed to correct this inexcusable error and denied the petition for rehearing without opinion. This action is in direct conflict with the rule of *Maryland Casualty Co.* v. *Jones*, 279 U. S. 792, 73 L. Ed. 960-963, where it is said:

> "Since on the face of the record, the failure of the circuit court of appeals to consider the assignments of error relating to rulings at the hearing is unexplained, and its action appears to have been erroneous, its judgment must be reversed."

citing *Krauss Bros.* v. *Mellon*, 276 U. S. 386-394, 72 L. Ed. 620-624. Upon the plainest principles of the enlightened justice which is intended to prevail in the federal courts, that failure was a grievous error which should be corrected by this court.

The evidence offered as above was admissible for the purpose of showing good faith and that the defendants had reason to believe the statements in Representations 2, 3, 6, 12 and 15 were true.

The circuit court of appeals stated that the evidence showed that defendants were guilty and, therefore, not prejudiced by the error, but no showing of guilt can justify shutting out evidence offered and tending to prove innocence.

III.

SUBMITTING UNSUPPORTED ISSUES.

Where there is a total want of evidence to support one or more of the alleged false representations in the indictment and defendants request instructions withdrawing such representations from the jury on that ground, should such requested instructions be given?

The indictment charged that the scheme to defraud was that defendants would make the sixteen certain representations set out above *knowing* each of them to be false (R. 4).

Let it be noted that defendants do not claim that sixteen schemes were alleged. They do insist sixteen *means* were set out to accomplish the one alleged scheme to defraud. Each representation was such a means. Representations 7, 9, 10 and 14 in full are as follows:

> 7. "That the price or fee for the treatment of cancer by the defendants at the Baker Hospital and the Baker Institute was very small."

9. "That in the event the cure was not perfected during the patient's *first stay* at the hospital, then all future treatments administered to the patient would be done by the defendants free of any charge or cost to the patient except for room, board and transportation."

10. "That cancer in its last stages could be and had been cured by the use of the so-called Baker treatments in the Baker Institute and the Baker Hospital (by distributing to the public printed pamphlets and catalogues showing pictures of sufferers of cancer in its last stages then, in said pamphlets and catalogues), falsely representing and pretending that said sufferers in the last stages of cancer had been *completely cured by the said defendants,* as aforesaid" and see 15 as to other diseases.

14. "That the cost to the patients for the treatment and cure of any of the above-mentioned diseases was very low."

No evidence was introduced nor any attempt made by the Government to introduce evidence that any one of these representations was false.

Representation No. 10 requires special consideration because of the prosecuting attorneys' distortion of the evidence and unfair claim in argument that the test patients were represented by the defendants as having been completely cured, and the findings of the circuit court to the same effect.

It should be noted that the *wording* of representation No. 10 makes *no reference to the five test patients at all.* By its very terms it relates to patients claimed to have been *cured by the defendants.*

The Government proved by its own testimony that the test patients *were treated by Dr. Ozias* and *not by the defendants* themselves (R. 183, l. 3). Dr. Ozias said: "They came there and I treated them." Therefore, they did not come within the terms of representation No. 10 and those representations should not have been submitted to the jury.

Furthermore no evidence was offered by the Government that the patients whose pictures were published in the reprint (R. 97 to 116) had not been cured. As a matter of fact, the Government introduced in evidence (R. 97 to 116) the pictures and statements of patients interviewed by Mr. Bellows after taking the Ozias treatment. None of them were contradicted by the Government, and under the doctrine of *Young* v. *U. S.*, 97 F. 2d 200, their statements are to be taken as true.

As an example Mrs. W. B. DeArmond, whose picture appears on record page 99, in her written statement dated September 10, 1929, said:

> "Mr. N. Baker,
> Care 5NT Magazine,
> Muscatine, Iowa.
>
> Dear Sir:
>
> I just had a talk with Mr. Bellows and I wish to add to my statement of the success of this treatment of cancer and T. B. *of which I had both.*
>
> I was *completely* cured three years ago by a three months' treatment. My baby has been born since that time and she and I both have been well ever since. I do not hesitate to recommend this treatment in all such cases" (R. 102).

The statement of A. E. Clarke (R. 104), whose picture appears on record page 106, should be noted; also the case of R. A. Bellows (R. 108), and Mrs. B. (R. 110). What could be more "wonderful" than a remedy which would cure the multiple cancers of Mrs. B. Note also the case of Rev. James A. P. (R. 113) cured of rheumatism, and of Mrs. C. who contracted tuberculosis after the removal of both breasts for cancer (R. 116).

With the entirely uncontradicted presumption that these persons had been cured as stated, nothing was left to justify the submission of the representation that defendants falsely published pictures of various patients as having been cured, who had not been cured.

More than that, the evidence not only failed to show a scheme to defraud by representing that the test patients had been completely cured, but it shows express statements published and circulated by the defendants, that the test patients were not cured but had died (Ex. 29, R. 740).

In Exhibit 29, issued by the Baker Hospital in 1934 (R. 739-741), the death of the test patients is expressly related.

Even the reprint, Plaintiff's Exhibit 6 (R. 79), expressly stated that the test patients had not recovered. As to test patient No. 1 it says that after beginning the treatment she left and "at the time she left the radium burn was about half healed. The treatment was only about *half* completed * * *. The investigators do not regard her as cured" (R. 87).

As to test patient No. 2, it says (R. 88):

> "He went back to work at his trade as an iron molder a few weeks ago. He will *continue* the treatment."

This certainly is not a representation that he was cured, or why should he continue the treatment?

As to test patient No. 3, it says (R. 89):

> "At this writing the cancer which originally covered practically the entire abdomen has been *reduced* to a lump about the size of a walnut."

and this is nowhere disputed.

As to patient No. 4, it is said (R. 90-91):

> "The mass at the edge of the jaw where the operation was performed showed *signs* of healing."

This is certainly not the representation that he was cured.

As to patient No. 5, it is said (R. 91):

> "We have not had the opportunity to see this patient for three weeks because she left to visit her home. She will return and *resume* the treatment."

It further states at page 92 of the record:

> "It may appear to the reader that these test patients do not show a complete clearing up of the cancer—in other words, *are not yet completed.*"

Also:

> "The fact that in the short time since the test began all traces of the cancers have *not yet* been eradicated, has been taken into full consideration by the investigators."

Similar statements appear in the book "Doctors, Dynamiters and Gunmen" (Ex. No. 8, R. 170). As to test patient No. 1, it is said:

> "The hard radium-burned cancerous mass *began* to soften and diminish. Much hope was held out for her recovery—if not complete, at least to such an extent that many happy years would be added to her life."

It then says the patient was called home "and didn't return for the rest of the treatment. When she left, the doctors recorded that the cancerous mass was about *half* healed" (R. 173).

As to patient No. 2 it states expressly that he had gone to Chicago and "had a prominent physician there perform the operation, and was killed on the operating table" (R. 175).

As to patient No. 3 it is expressly stated that a history was given of his refusing to follow the doctor's orders as to diet. "He became so unruly that the doctor told him that he would have to obey instructions or that the treatments would have to be discontinued. In the end this was done. Dr. Howe took over the case, and in five weeks the patient died" (R. 177).

As to test patient No. 4 it is said:

> "According to the report of Baker's representative, in three weeks the swelling of the upper lip had entirely disappeared, and the entire solid mass under the chin had *started* to soften. Even the cancerous mass at the edge of the jaw, where the operation had taken place, showed *signs* of healing. * * *" (R. 179).

The fifth test patient was diagnosed by Dr. Barewald as an obvious case of cancer. She went to Dr. Ozias.

> "After a few weeks of the treatment the cancerous mass was softening rapidly and gradually disappearing. * * * She finally left the hospital to visit her home, promising to return for the rest of the treatment" (R. 179).

Certainly the repeated assertions of the prosecuting attorneys that the five test patients were represented as completely cured were utterly unfounded and the same statement made by the circuit court of appeals was equally unfounded.

There being no evidence to justify conviction for making representation No. 10, it was manifest error to submit that "means" to the jury. The lower court submitted all sixteen of the alleged false representations to the jury and told them to convict if they found defendants devised a scheme to defraud by making them, and sent the letters in question to effectuate that scheme (R. 1003, 1007, 1009).

The submission of these issues was assigned as error (R. 1069, 1070, 1071, 1072) and the court's refusals to give instructions requested by defendants to withdraw these issues were excepted to (R. 1034).

In its opinion the circuit court of appeals stated:

> "The magazine first issued in December, 1929, stated that the five test patients had been cured.

> Reprints carrying the *same* story were sent out. In 1936, Baker published a book in which he again made claim to having *favorably treated* these test patients, all of whom had in fact been dead for several years" (R. 1197).

This was a clear oversight, as pointed out in defendants' petition for rehearing (R. 1212).

The circuit court of appeals apparently takes the position that *it was not necessary to prove all of the alleged misrepresentations* and therefore that it was not error to submit *all* of the alleged misrepresentations to the jury and authorize a conviction on *any* of them whether proven or not, so long as there was evidence to support some one of them.

It did say (although we contend erroneously) that there was evidence to show that defendants had represented their treatments as a "*sure cure*," reading the words "positive" and "permanent" and "wonderful" to make them synonymous with "sure." They are not synonymous. It did hold that defendants represented the test patients as having been entirely cured thereby, overlooking the evidence in that respect, but nowhere will you find any statement in the opinion that there was any evidence (a) that the prices charged by the Baker Hospital were not low (Rep. No. 7 nor No. 14) (b) that defendants ever guaranteed to treat free their patients not cured at their first stay in the hospital (Rep. No. 9). Both were submitted to the jury.

To allow conviction upon these unsupported issues is clearly in conflict with decisions both of this court and of various circuit courts of appeal and also of the general principles of law prevailing generally in this country.

In *Quercia* v. *U. S.*, 289 U. S. 466, 77 L. Ed. 1321, it is said:

> "He may not charge the jury upon a supposed or conjectural state of facts, of which no evidence has been offered."

In *U. S.* v. *Breitling,* 20 How. 252, 15 L. Ed. 900, it is said (page 902):

> "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered."

Patterson v. *U. S.,* 222 Fed. 599, held it was error to submit question whether certain *means* of which there was no evidence were included in the alleged conspiracy in restraint of trade.

Parks v. *Ross,* 11 How. 362, 13 L. Ed. 730:

> "But a jury has no right to assume the truth of any material fact, without *some evidence legally sufficient to establish it.* It is, therefore, error in the court to instruct the jury that they may find *a* material fact, of which there is no evidence from which it may be legally inferred."

See, also, *Nash* v. *U. S.,* 229 U. S. 373, and 14 R. C. L., page 786, and *Ward* v. *U. S.,* 14 Wall. 28, 20 L. Ed. 792.

A good statement of the rule is found in 14 R. C. L., page 786.

That statement of the rule is supported by about two hundred citations in the footnotes shown on pages 786, 788, 789 and 790 of the text.

Shreve v. U. S. Should Be Overruled As to Issues Unsupported by Evidence.

To support their claim that it was not error to submit issues to the jury which were unsupported by the evidence (p. 72) counsel cited *Kastell* v. *U. S.,* 23 F. 2d 156. In that case it was said:

> "The third point is that the judge, in charging the jury, did not limit their consideration to such representations as induced the defendants' customers to pay interest and other charges upon their debit balances. * * *

"To confine the jury to that feature would have defeated the very plain intendment of the indictment as a whole."

In *Shreve* v. *U. S.*, (C. C. A. 9) 103 F. 2d 796, it is said:

"The appellants raised but two questions on the instructions: * * * (2) the court failed to instruct the jury, as requested, that there had been no evidence introduced tending to show defendants made representations that the Security Building and Loan Association had a paid-in capital stock of $300,000 as alleged in the indictment.

"* * * The court is not required to instruct the jury to disregard every allegation of the indictment upon which no proof is presented."

If this casual statement was intended by the court as laying down the principle that issues entirely unsupported by the evidence could properly be submitted to the jury as a basis for conviction of a defendant in a criminal case, it is so obviously contrary to established principles of criminal procedure, so obviously contrary to the due process of law guaranteed by the Fifth Amendment of the Federal Constitution, so obviously opposed to the overwhelming weight of authority that it ought to be clearly and definitely overruled by this court, and it ought to be done immediately before it has been carelessly followed.

Certainly the right to have the jurors instructed that they cannot convict upon charges entirely unsupported by the evidence is a matter of substance of greatest importance, and not a matter of "trial etiquette." *Bruno* v. *U. S.*, 84 U. S. L. Ed., Adv. Op., p. 160.

The decision of the court below is squarely contrary to the various Supreme Court decisions which we cited above. Cases holding that sentence upon a verdict would be sustained where the evidence supported any one of the counts, and the sentence was no more than could have been given upon a single count, are not in point and have no application to the case at bar.

IV.

SUBMITTING FALSE ISSUES—NEGLIGENCE.

For brevity, we have omitted argument here upon this point.

V(a).

MERE OPINION INSUFFICIENT.

In a criminal case depending upon circumstantial evidence where the evidence for the Government and the uncontradicted evidence for defendants is more consistent with innocence than with guilt, should the court allow the jury to convict or direct a verdict of acquittal?

V(b). In a mail fraud case, is the mere opinion of experts that a remedy is valueless, not based upon facts observed by them sufficient to show that a contrary opinion held by defendants was not held in good faith?

There are two lines of cases bearing upon statements of opinions that require clarification, viz.: cases relating to misbranding and cases relating to statements of opinions as false and fraudulent representations.

As to the latter, it is well settled that before one can be convicted for misrepresenting an opinion, it must be shown beyond doubt that such opinion was falsely represented—in other words, that defendant did not hold the particular opinion which he expressed. The question now presented is whether mere opinions of experts that a given treatment is worthless, not founded on actual use of it, are sufficient to show that defendants did not believe that treatment had merit.

Did Defendants Believe the Baker Treatments Would Cure?

It should be noted here that while the circuit court of appeals held that defendants did not believe in their remedies, it bases that holding upon the opinion of two expert witnesses, Drs. Cutler and Wood, to the effect that the phenol compound used by defendants would not cure cancer nor anything else.

The opinion says:

> "Eminent medical experts testified that the remedies used would not effect a cure for cancer nor do any good to anything. Many other facts in evidence might be related but the evidence which is here recited abundantly shows the lack of any basis for good faith in defendants" (R. 1196).

The effect was to set the opinion of the Government's experts against the opinion of the defendants and defendants' experts.

It should be further noted that this testimony of the experts as to their opinions was *opinion only* and was *not* based upon any observed facts. All of the Government's experts testified that they had *never* administered nor tried the phenol compound in question as a medicine for human beings (R. 402, l. 9, and R. 379, last three lines). All of them testified they had never seen it administered or tried on people. Not one pretended to have any knowledge of any specific *facts* as to its use to justify his opinions.

Now it ought to be hornbook law that you cannot disprove A's opinion by B's opinion to the contrary—that the possession of one opinion by one man or set of men does not prove dishonesty in the opposite opinion held by another man or set of men. It amounts merely to "X equals X."

Dr. Wood testified:

> "I know of no record of cures by the injection of hydrochloric acid and carbolic acid" (R. 401).
>
> "I didn't feel justifiable to put it into people, I didn't want to, and *never saw it injected into a person*" (R. 402).

He also said:

> "Well, *my idea*, Judge, has to be based, of course, upon experimental work with animals, and therefore I apologize to you for bringing it in, but you can't do it on human beings."

Dr. Cutler, when asked whether the injection of the phenol compound in question would cure cancer, answered:

> "*I think not. I doubt* that they will cure and have cured after all others will fail. I have every *reason to think* that either of these solutions would not bring about a cure of cancer, with the single exception of the solution which contains carbolic acid, which coming into contact with a little early relatively benign tumor or cancer of the skin, *that cancer will be destroyed* by that carbolic acid and *the lesion healed.* A cancer of the skin so that the carbolic acid in one of these medicines, if there was enough of it, with proper concentration *would destroy the growth it was in;* but a highly malignant tumor—I cannot conceive of that healing a cancer or of curing it" (R. 377-378).

The very form of his answers—"I think"—"I doubt" —shows that he is expressing an opinion only. He also said expressly:

> "I never in all my experience injected a solution containing the exact formula of carbolic acid, glycerin and alcohol that I read in number five, and never saw it done by anybody else" (R. 379).

On the contrary the undisputed evidence of some of the Government's witnesses and the defendants' experts is that they had seen and known and used the phenol compound treatments for years with good success.

Dr. Ozias, called by the Government, testified:

> "In the treatment I follow the hypodermic procedure. * * * I inject medicine in the tissue. * * * I have been treating cancer in that way about forty-five years. It is the only way to treat cancer in my judgment. I cannot tell you how many patients I have treated, but many" (R. 183).

And he had injected the phenol compound many years (R. 557).

Harry Hoxsey, called by the Government, testified to giving both local and systemic treatments. He said:

> "we give internal treatment for systemic elimination of toxins and it is picked up, absorbed by the lymphs and drained out through the bloodstream and kidney and bowel" (R. 307).
>
> "* * * we give the internal treatment at the same time in many, many cases which we have pathologized to bring out those where the lymphs in the arm and in the neck are involved" (R. 307). "The fact is, we treat *through the bloodstream*" (R. 307).

And with reference to cures, he said:

> "Our records for the last year showed a little better than eighty per cent" (R. 308).

Dr. Perdue, the most extensive writer on cancer in North America (R. 537), testified that "cancer is a systemic disease with a local manifestation" (R. 549), and that the proper treatment for cancer was to put on some chemical "that will take the water out of the cancer and won't take it out of the normal tissues" (R. 551), and said:

> "There are a number of liquid chemical substitutes, like the various preparations of alcohol, phenol and glycerin and other modifications of them but that is the principal one" (R. 552).

He also said:

> "For instance, the glycerin, alcohol and phenol, that is carbolic acid, as shown to be one of the remedies used by the defendants at the Baker Hospital, if a patient is given say a third, approximately, one third of each one, dosages will vary a little bit, * * * putting that into phenol and glycerin *it makes a new combination* which takes all the poison out, and does not destroy sound tissue at all or injure it in any way. If it is injected into and around the cancer tissue, it is one of the most rapid elements for taking out the water that we know, and that is what we seek to do in all cases of cancer. * * * Now this solution of twenty-five per cent glycerin, twenty-eight per cent phenol and forty-seven per cent alcohol would be all right."

* * * * * * *

He also said:

> "I have been in cancer research thirty-five years" (R. 554).
>
> "* * * This use of alcohol, phenol and glycerin, up in Missouri we call that the Ozias method. I have known Dr. Ozias well for years, and *that is the method he uses* and it is the scientific for the taking out of the ionized water out of the cancer, and the use of escharotics, the injection of medicine for the curing of cancer *is in general use all over the world*" (R. 557).

Dr. Loffler, called by defendants, testified that he had seen hundreds of cancer cases treated with a compound containing some phenol; that he had seen thousands of operations at Rochester (R. 590); hundreds of patients treated by Dr. Nichols with escharotics with very good results (R. 590); and that the results of the application of escharotics in the treatment of cancer "*are far superior and much safer*, I would say safe, as compared with the other means of treatment" such as surgery, X-ray and radium (R. 593). He also testified that "all cancer patients are *short of hydrochloric acid*" (R. 596) and that "hydrochloric acid is given great value in the economy, no matter how applied" (R. 596). Also, that

the injection of a solution of it in the hips for anemic persons "is very valuable." He also testified that the carbolic acid in the combination in question would not hurt anybody (R. 601).

Forty-five Facts.

Forty-five patients, cured at the Baker Hospitals, were called to testify to the efficacy of defendants' treatments. All of them were shown to have had cancer or other serious ailments. Among them were the following:

A "Wonderful" Cure.

Worley J. Bishop was on his way to the Willis Campbell Clinic in Memphis for removal of his left breast, left arm at the socket and perhaps part of the shoulder and shoulder blade for sarcoma of the bone (R. 653); stopped at the Baker Hospital (R. 457) and was cured.

Mrs. Emily Erstine, age 45, diagnosed by doctors who wanted to take all the breast out and the tissues down to the glands under the right arm. She took the Baker treatments and was completely cured (R. 483).

A "Permanent" Cure.

Mrs. Thomas Howell, 60 years of age, went to the Baker Hospital at Muscatine in 1936, "an awfully sick woman." Took Baker treatments. Said "I feel like I owe my life to the Baker Hospital. I have been in the same apparent good health since that time that I am in now" (R. 487-488).

A "Positive" Cure.

Mrs. Jessie Baker, aged 65, received Baker treatments in 1936. Had pains from one breast to the other and a lump as big as a hen's egg. At the end of three weeks Baker treatments "that lump fell out. It was so large it filled the doctor's hand. Went back for a recheck in 1938. I am perfectly well, feel well" (R. 508).

Mrs. Mildred Pecanty, 49 years of age, had almost complete obstruction in the outlet of the stomach and had uterus trouble. "* * * My whole food intake was milk, two swallows an hour. Took two courses of Baker treatments and made a wonderful gain. I never have a pain or that trouble in my stomach, * * *. And the uterus trouble, I think, is completely gone. * * * I feel like I am perfectly well" (R. 520-525).

A Permanent Cure.

Mrs. Anna Boldys, age 65, testified she had cancer of the right breast. Took the Baker treatments in 1932, and said:

> "My breast is all right now, and it has been all right ever since I took the treatments, * * * that trouble had never come back" (R. 711).

A Ten-Year Cure.

Mrs. P. H. Staab, age 62, went to the Baker Hospital in March, 1930, for treatment of the womb. Had received treatment from other doctors without benefit. After taking the Baker treatments, said:

> "I just kept getting stronger * * * all the pain had left me * * * the condition of my health today is just fine" (R. 716).

Nellie Swafford, age 55, had soreness and lumps inside her abdomen, the size of an orange, "* * * had been to two physicians and they didn't treat me because I didn't want no operation." * * * was relieved by Baker treatment. She said:

> "I was cured of that condition, and had no pain since taking this treatment, and my condition of health today is fine" (R. 718-719).

A Ten-Year Cure.

Mrs. R. E. White, age 48 (R. 721), went to the Baker Hospital in 1930 for treatment for tumor—uterus was

affected. "* * * wouldn't have an operation. After the first two weeks' treatment at the Muscatine hospital I was improving * * * and I recovered completely * * * I am now physically strong and well."

Wonderful and Permanent.

Mrs. Flora Berchtholder, age 63, took treatments at the Baker Hospital for cancer of the uterus, commencing May 21, 1931, and she said:

> "On leaving the hospital I certainly felt that I was well, and there has never been any sign of a recurrence since" (R. 723).

Mrs. Bertha Garnett (R. 724), who entered the Baker Hospital April 12, 1930, said:

> "They took me out of bed, wrapped me up, made a bed in the back of the car and took me to the Baker Hospital, because I couldn't walk. I had lost the use of my right leg, was caused by the growth that was on my uterus. * * * I know I had a growth on the uterus. * * * I know that I had lost the use of my leg, * * * At the end of the treatment, I picked up my suitcase and walked to the depot and went home. I was not able to do that when I came to Muscatine. I was completely recovered as far as I am able to tell, and my condition of health since has been fine" (R. 725).

Mrs. W. F. Porter (R. 735) had received the Baker treatments in 1930. She said:

> "I was in a run-down condition for two years, and my physician carried me up there to the Baker Hospital and my case was in such condition they really didn't like to take it in, but I was determined. Since that time my condition of health has been perfect. It was eight years last June, and I have had no recurrence whatever" (R. 735-736).

Elizabeth Cook went to the Baker Hospital in August, 1935, with her colon completely closed. Couldn't get anything through except fluids. Had taken treatments

at other hospitals including Mayo's. Referring to the Baker treatments, she said:

> "The effect of those treatments on my health was good * * * I feel that I am completely cured."

She said on cross examination:

> "I drove over in an automobile by myself from Inglewood, California. * * * When they arrested Mr. Baker last fall, I wrote and told him if I could be of any assistance to him, I would do it, and that's the reason I came to help him out. Who wouldn't when he had saved your life, and that's the reason I came" (R. 747) "and I would do it again, too" (R. 748).

We cannot take space to quote the testimony of the remaining cured patients. Certainly these cures justify the terms "Wonderful," "Positive" and "Permanent."

There is no reasonable explanation for the above forty-five cures except the Baker treatments. THESE CURED PATIENTS WERE PHYSICAL FACTS. Against these physical facts stand the mere opinions of professional expert witnesses not one of whom ever saw these treatments applied to a human being.

Statements of Mr. Justice Brandeis in which Mr. Justice Holmes concurred in *Pierce* v. *U. S.*, 252 U. S. 239, 64 L. Ed. 542-556, are particularly applicable to this case. It is there said:

> "* * * But, even if the passages from the leaflet set forth in the third count could be deemed false statements within the meaning of the act, the convictions thereon were unjustified because evidence was wholly lacking to prove any one of the other essential elements of the crime charged. Thus, there was not a particle of evidence that the defendants knew that the statements were false. * * * *We may be convinced* that the decision to enter the great war was wholly free from such base influences but we may not, because such is our belief, permit a jury to find, *in the absence of evidence*, that it was proved beyond a reasonable doubt that these de-

> fendants knew that a statement in this leaflet to the contrary was false."

The applicable rule is well stated in *Ridenour* v. *U. S.*, 14 F. 2d 888, as

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused."

citing to the same effect *Hart* v. *U. S.*, (C. C. A. 3) 84 Fed. 799-808; *U. P. Coal Co.* v. *U. S.*, 173 Fed. 737; *Wiener* v. *U. S.*, (C. C. A. 3) 282 Fed. 799-801, and this is the established rule of the United States Supreme Court.

It is likewise an established rule that in determining whether there is sufficient evidence to support a verdict, if found, the court must take into consideration the undisputed testimony of disinterested witnesses for the defendant, as well as the circumstances shown by the Government.

We respectfully submit that prejudicial misconduct, rejection of evidence offered to show good faith, permitting conviction for representations not shown to be false, or not made by defendants, confusing negligence with fraud, and permitting conviction upon expert opinions not founded on facts contrary to undisputed evidence of many cures of many diseases, wrought by the Baker treatments, are errors demanding reversal and whose importance far transcends any particular case but goes to the very heart of federal judicial procedure—the last citadel of honesty in a great democracy.

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